



DEPARTMENT OF THE NAVY

NAVAL AIR STATION
LEMOORE, CALIFORNIA 93246-5001

IN REPLY REFER TO:

NASLEMINST 5800.1G CH-1
011
22 Jul 92

NAS LEMOORE INSTRUCTION 5800.1G CHANGE TRANSMITTAL 1

From: Commanding Officer, Naval Air Station, Lemoore

Subj: AUTHORIZATION AND PROCEDURE FOR SEARCH AND SEIZURE OF
PROPERTY

1. Purpose. To issue pen and ink changes to the basic instruction.
2. Action. Enclosure (2), page 2, paragraph 4, change telephone numbers "998-2561/3287" to read "998-3351/3347" and "998-3360" to read "998-3300".


A. R. GORTHY

Distribution: (NASLEMINST 5215.2S)
List B & E





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NASLEMINST 5800.1G
011
9 Apr 90

NAS LEMOORE INSTRUCTION 5800.1G

From: Commanding Officer, Naval Air Station, Lemoore

Subj: AUTHORIZATION AND PROCEDURE FOR SEARCH AND SEIZURE OF PROPERTY

Ref: (a) Manual for Courts-Martial, 1984
(b) JAG Manual

Encl: (1) Part III, Manual for Courts-Martial, 1984
(2) Command Authorized Search Summary
(3) Command Authorized Search General Discussion
(4) Special Problem Areas
(5) Questions to be Asked Before Granting a Search Authorization
(6) Search Authorization: Informant Addendum
(7) Searches: Description of Where to Look and Description of Items to be Seized

1. Purpose. To publish information concerning lawful searches and seizures on board Naval Air Station, Lemoore.

2. Cancellation. NASLEMINST 5800.1F

3. Objective. To ensure that every search (search being defined herein as a quest for incriminating materials of any kind) conducted by members of this command be performed in such a manner that the constitutional and statutory rights and privileges of persons subject to search are not violated and that materials seized may be admissible in any subsequent judicial proceedings.

4. Lawful Searches. Reference (a), Rule 311, states the general rule that evidence obtained as a result of an unlawful search or seizure performed by a person acting in a government capacity is inadmissible against the accused. Reference (a), Rules 312 through 317, define various types of lawful searches and seizures and have been reproduced in their entirety as enclosure (1). Interpretation of these highly technical rules is often difficult and the assistance of the Station Judge Advocate or Duty NLSO attorney should be solicited whenever possible. Requests for search based upon probable cause supported by oath or affirmation are the most commonly faced search scenarios and are dealt with at length in enclosures (2) through (7).

5. Delegation of Authority. Authority to authorize searches may not be delegated. The Commanding Officer or acting Commanding Officer only may authorize searches utilizing the information procedures contained in enclosures (2) through (7) and forms listed in paragraph 8.

6. Action. All searches conducted within the limits of Naval Air Station, Lemoore, California shall be made in accordance with the provisions of reference (a) and this instruction. Should any part of reference (a), as presently

9 Apr 90

drafted or as amended in the future, be at variance with the provisions of this instruction, then reference (a) shall be controlling. Nothing in this instruction should be construed as limiting the authority to conduct searches and seizures in accordance with the requirements of the Constitution of the United States, applicable statutes, and reference (a).

7. Maintenance of Instruction. The Station Judge Advocate's Office is responsible for maintenance of this instruction.

8. Forms

(a) The following forms may be obtained at the Security Office, NAS Lemoore:

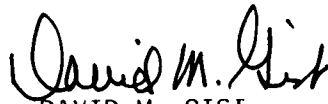
(1) Record of Oral Request for Search Authorization (NAS LEMOORE (GEN) 5800/13 (Rev. 11-84))

(2) Affidavit for Search Authorization (OPNAV 5527/10 (12-82))

(3) Record of Search Authorization (NAS LEMOORE (GEN) 5800/15 (Rev. 11-84))

(4) Command Authorization for Search and Seizure (OPNAV 5527/9 (12-82))

(5) Permissive Authorization for Search and Seizure (OPNAV 5527/16 (12-82))


DAVID M. GIST

Distribution: (NASLEMINST 5215.2R)
Lists B & E

MANUAL FOR COURTS-MARTIAL, UNITED STATES 1984

PART III MILITARY RULES OF EVIDENCE

Rule 312. Body views and intrusions

(a) *General rule.* Evidence obtained from body views and intrusions conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Visual examination of the body.*

(1) *Consensual.* Visual examination of the unclothed body may be made with the consent of the individual subject to the inspection in accordance with Mil. R. Evid. 314(e).

(2) *Involuntary.* An involuntary display of the unclothed body, including a visual examination of body cavities, may be required only if conducted in reasonable fashion and authorized under the following provisions of the Military Rules of Evidence: inspections and inventories under Mil. R. Evid. 313; searches under Mil. R. Evid. 314(b) and 314(c) if there is a reasonable suspicion that weapons, contraband, or evidence of crime is concealed on the body of the person to be searched; searches within jails and similar facilities under Mil. R. Evid. 314(h) if reasonably necessary to maintain the security of the institution or its personnel; searches incident to lawful apprehension under Mil. R. Evid. 314(g); emergency searches under Mil. R. Evid. 314(i); and probable cause searches under Mil. R. Evid. 315. An examination of the unclothed body under this rule should be conducted whenever practicable by a person of the same sex as that of the person being examined; provided, however, that failure to comply with this requirement does not make an examination an unlawful search within the meaning of Mil. R. Evid. 311.

(c) *Intrusion into body cavities.* A reasonable nonconsensual physical intrusion into the mouth, nose, and ears may be made when a visual examination of the body under subdivision (b) is permissible. Nonconsensual intrusions into other body cavities may be made:

(1) *For purposes of seizure.* When there is a clear indication that weapons, contraband, or other evidence of crime is present, to remove weapons, contraband, or evidence of crime discovered under subdivisions (b) and (c)(2) of this rule or under Mil. R. Evid. 316(d)(4)(C) if such intrusion is made in a reasonable fashion by a person with appropriate medical qualifications; or

(2) *For purposes of search.* To search for weapons, contraband, or evidence of crime if authorized by a search warrant or search authorization under Mil. R. Evid. 315 and conducted by a person with appropriate medical qualifications.

Notwithstanding this rule, a search under Mil. R. Evid. 314(h) may be made without a search warrant or authorization if such search is based on a reasonable suspicion that the individual is concealing weapons, contraband, or evidence of crime.

(d) *Extraction of body fluids.* Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under Mil. R. Evid. 315. Nonconsensual extraction of body fluids may be made without such warrant or authorization, notwithstanding Mil. R. Evid. 315(g), only when there is clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the evidence. Involuntary extraction of body fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications.

(e) *Other intrusive searches.* Nonconsensual intrusive searches of the body made to locate or obtain weapons, contraband, or evidence of crime and not within the scope of subdivisions (b) or (c) may be made only upon search warrant or search authorization under Mil. R. Evid. 315 and only if such search is conducted in a reasonable fashion by a person with appropriate medical qualifications and does not endanger the health of the person to be searched. Compelling a person to ingest substances for the purposes of locating the property described above or to compel the bodily elimination of such property is a search within the meaning of this section. Notwithstanding this rule, a person who is neither a suspect nor an accused may not be compelled to submit to an intrusive search of the body for the sole purpose of obtaining evidence of crime.

(f) *Intrusions for valid medical purposes.* Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

(g) *Medical qualifications.* The Secretary concerned may prescribe appropriate medical qualifications for persons who conduct searches and seizures under this rule.

Rule 313. Inspections and inventories in the armed forces

(a) *General rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the

9 Apr 90

M.R.E. 313(c)

examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(c) *Inventories.* Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

Rule 314. Searches not requiring probable cause

(a) *General rule.* Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Border searches.* Border searches for customs or immigration purposes may be conducted when authorized by Act of Congress.

(c) *Searches upon entry to or exit from United States installations, aircraft, and vessels abroad.* In addition to the authority to conduct inspections under Mil. R. Evid. 313(b), a commander of a United States military installation, enclave, or aircraft on foreign soil, or in foreign or international airspace, or a United States vessel in foreign or international waters, may authorize appropriate personnel to search persons or the property of such persons upon entry to or exit from the installation, enclave, aircraft, or vessel to ensure the security, military fitness, or good order and discipline of the command. Such searches may not be conducted at a time or in a manner contrary to an express provision of a treaty or agreement to which the United States is a party. Failure to comply with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not authorized by this subdivision.

(d) *Searches of government property.* Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use; but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.

(e) *Consent searches.*

(1) *General rule.* Searches may be conducted of any person or property with lawful consent.

(2) *Who may consent.* A person may consent to a search of his or her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.

(3) *Scope of consent.* Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time.

(4) *Voluntariness.* To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.

(5) *Burden of proof.* Consent must be shown by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of the consent, but it does not affect the burden of proof.

(f) *Searches incident to a lawful stop.*

(1) *Stops.* A person authorized to apprehend under R.C.M. 302(b) and others performing law enforcement

duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

(2) *Frisks*. When a lawful stop is performed, the person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized.

(3) *Motor vehicles*. When a person lawfully stopped is the driver or a passenger in a motor vehicle, the passenger compartment of the vehicle may be searched for weapons if the official who made the stop has a reasonable belief that the person stopped is dangerous and that the person stopped may gain immediate control of a weapon.

(g) *Searches incident to a lawful apprehension*.

(1) *General rule*. A person who has been lawfully apprehended may be searched.

(2) *Search for weapons and destructible evidence*. A search may be conducted for weapons or destructible evidence in the area within the immediate control of a person who has been apprehended. The area within the person's "immediate control" is the area which the individual searching could reasonably believe that the person apprehended could reach with a sudden movement to obtain such property; provided, that the passenger compartment of an automobile, and containers within the passenger compartment may be searched as a contemporaneous incident of the apprehension of an occupant of the automobile, regardless whether the person apprehended has been removed from the vehicle.

(3) *Examination for other persons*. When an apprehension takes place at a location in which other persons reasonably might be present who might interfere with the apprehension or endanger those apprehending, a reasonable examination may be made of the general area in which such other persons might be located.

(h) *Searches within jails, confinement facilities, or similar facilities*. Searches within jails, confinement facilities, or similar facilities may be authorized by persons with authority over the institution.

(i) *Emergency searches to save life or for related purposes*. In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.

(j) *Searches of open fields or woodlands*. A search of open fields or woodlands is not an unlawful search within the meaning of Mil. R. Evid. 311.

(k) *Other searches*. A search of a type not otherwise included in this rule and not requiring probable cause under Mil. R. Evid. 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces.

Rule 315. Probable cause searches

(a) *General rule*. Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Definitions*. As used in these rules:

(1) *Authorization to search*. An "authorization to search" is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) *Search warrant*. A "search warrant" is an express permission to search and seize issued by competent civilian authority.

(c) *Scope of authorization*. A search authorization may be issued under this rule for a search of:

(1) *Persons*. The person of anyone subject to military law or the law of war wherever found;

M.R.E. 315(c)(2)

(2) *Military property.* Military property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located;

(3) *Persons and property within military control.* Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or

(4) *Nonmilitary property within a foreign country.*

(A) Property owned, used, occupied by, or in the possession of an agency of the United States other than the Department of Defense when situated in a foreign country. A search of such property may not be conducted without the concurrence of an appropriate representative of the agency concerned. Failure to obtain such concurrence, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311.

(B) Other property situated in a foreign country. If the United States is a party to a treaty or agreement that governs a search in a foreign country, the search shall be conducted in accordance with the treaty or agreement. If there is no treaty or agreement, concurrence should be obtained from an appropriate representative of the foreign country with respect to a search under paragraph (4)(B) of this subdivision. Failure to obtain such concurrence or noncompliance with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311.

(d) *Power to authorize.* Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) *Commander.* A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; or

(2) *Military judge.* A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned.

An otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(e) *Power to search.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

(f) *Basis for Search authorizations.*

(1) *Probable cause requirement.* A search authorization issued under this rule must be based upon probable cause.

(2) *Probable cause determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be based upon any or all of the following:

(A) Written statements communicated to the authorizing officer;

(B) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(C) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion.

The Secretary of Defense or the Secretary concerned may prescribe additional requirements.

(g) *Exigencies*. A search warrant or search authorization is not required under this rule for a search based on probable cause when:

(1) *Insufficient time*. There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(2) *Lack of communications*. There is a reasonable military operational necessity that is reasonably believed to prohibit or prevent communication with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(3) *Search of operable vehicle*. An operable vehicle is to be searched, except in the circumstances where a search warrant or authorization is required by the Constitution of the United States, this Manual, or these rules; or

(4) *Not required by the Constitution*. A search warrant or authorization is not otherwise required by the Constitution of the United States as applied to members of the armed forces.

For purpose of this rule, a vehicle is "operable" unless a reasonable person would have known at the time of search that the vehicle was not functional for purposes of transportation.

(h) *Execution*.

(1) *Notice*. If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this rule, the person conducting the search should when possible notify him or her of the act of authorization and the general substance of the authorization. Such notice may be made prior to or contemporaneously with the search. Failure to provide such notice does not make a search unlawful within the meaning of Mil. R. Evid. 311.

(2) *Inventory*. Under regulations prescribed by the Secretary concerned, and with such exceptions as may be authorized by the Secretary, an inventory of the property seized shall be made at the time of a seizure under this rule or as soon as practicable thereafter. At an appropriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy thereof, or otherwise comply with this paragraph does not render a search or seizure unlawful within the meaning of Mil. R. Evid. 311.

(3) *Foreign searches*. Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation. Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

(4) *Search warrants*. Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or an applicable Act of Congress.

Rule 316. Seizures

(a) *General rule*. Evidence obtained from seizures conducted in accordance with this rule is admissible at trial if the evidence was not obtained as a result of an unlawful search and if the evidence is relevant and not otherwise inadmissible under these rules.

(b) *Seizure of property*. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape.

(c) *Apprehension*. Apprehension is governed by R.C.M. 302.

(d) *Seizure of property or evidence*.

(1) *Abandoned property*. Abandoned property may be seized without probable cause and without a search warrant or search authorization. Such seizure may be made by any person.

M.R.E. 316(d)(2)

(2) *Consent*. Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under Mil. R. Evid. 314.

(3) *Government property*. Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subdivision (e), unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein, as provided in Mil. R. Evid. 314(d), at the time of the seizure.

(4) *Other property*. Property or evidence not included in paragraph (1)-(3) may be seized for use in evidence by any person listed in subdivision (e) if:

(A) *Authorization*. The person is authorized to seize the property or evidence by a search warrant or a search authorization under Mil. R. Evid. 315;

(B) *Exigent circumstances*. The person has probable cause to seize the property or evidence and under Mil. R. Evid. 315(g) a search warrant or search authorization is not required; or

(C) *Plain view*. The person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize.

(5) *Temporary detention*. Nothing in this rule shall prohibit temporary detention of property on less than probable cause when authorized under the Constitution of the United States.

(e) *Power to seize*. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or individual designated by proper authority to perform guard or police duties, or any agent of any such person, may seize property pursuant to this rule.

(f) *Other seizures*. A seizure of a type not otherwise included in this rule may be made when permissible under the Constitution of the United States as applied to members of the armed forces.

Rule 317. Interception of wire and oral communications

(a) *General rule*. Wire or oral communications constitute evidence obtained as a result of an unlawful search or seizure within the meaning of Mil. R. Evid. 311 when such evidence must be excluded under the Fourth Amendment to the Constitution of the United States as applied to members of the armed forces or if such evidence must be excluded under a statute applicable to members of the armed forces.

(b) *Authorization for judicial applications in the United States*. Under 18 U.S.C. § 2516(1), the Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge of competent jurisdiction for, and such judge may grant in conformity with 18 U.S.C. § 2518, an order authorizing or approving the interception of wire or oral communications by the Department of Defense, the Department of Transportation, or any Military Department for purposes of obtaining evidence concerning the offenses enumerated in 18 U.S.C. § 2516(1), to the extent such offenses are punishable under the Uniform Code of Military Justice.

(c) *Regulations*. Notwithstanding any other provision of these rules, members of the armed forces or their agents may not intercept wire or oral communications for law enforcement purposes unless such interception:

(1) takes place in the United States and is authorized under subdivision (b);

(2) takes place outside the United States and is authorized under regulations issued by the Secretary of Defense or the Secretary concerned; or

(3) is authorized under regulations issued by the Secretary of Defense or the Secretary concerned and is not unlawful under 18 U.S.C. § 2511.

Rule 321. Eyewitness identification

(a) *General rule*.

(1) *Admissibility*. Testimony concerning a relevant out of court identification by any person is admissible, subject to an appropriate objection under this rule, if such testimony is otherwise admissible under these rules.

COMMAND AUTHORIZED SEARCH SUMMARY

1. Background. This instruction provides guidelines to aid the search authority in determining the propriety and scope of any search authorization which might issue.

2. Standard Evolution. The Commanding Officer will receive an oral or written request for search authorization, indicating the area to be searched, the items sought, and the reason why a search authorization should be granted. The information supporting the request for the search authorization should be made under oath or affirmation, which may be administered by the Commanding Officer, and will be recorded using either "Record of Oral Request for Search Authorization," or "Affidavit for Search Authorization." The Commanding Officer will review all information properly before him and determine if probable cause exists to support a search authorization. If authorization to search is granted, the search authority will complete a "Record of Search Authorization" and a "Command Authorization for Search and Seizure." The Record of Search Authorization will be returned to the Station Judge Advocate's Office.

3. Procedure. The following procedure should be used in processing a request for search authorization.

a. The Commanding Officer will determine if the information presented has been made under oath or affirmation. Information presented in writing may be in any form but will commonly be made utilizing an "Affidavit for Search Authorization." Information presented orally will be recorded by the search authority after placing the affiant under oath. The "Record of Oral Request for Search Authorization" form should be used. The search authority shall administer oaths as necessary in receiving information.

b. The Commanding Officer shall review information properly before him and determine if it is sufficient to support a determination that probable cause exists. The Commanding Officer shall request additional information as necessary. Additionally, the Commanding Officer shall ensure that information provided by informant(s) meets the necessary credibility and reliability standards.

c. The Commanding Officer, upon reaching a determination that probable cause exists shall record that determination on a "Record of Search Authorization" form following the instructions on that form.

d. The Commanding Officer shall also complete a "Command Authorization for Search and Seizure" form. The original shall be attached to the "Record of Search Authorization" form and a copy shall be given to the person exercising the search.

e. The completed "Record of Search Authorization," with attachments, will be forwarded to the Station Judge Advocate's Office where it will be retained.

NASLEMINST 5800.1G

9 Apr 90

4. Legal Assistance. Further legal assistance is available from the Station Judge Advocate. If the Station Judge Advocate is not available, the duty attorney should be consulted.

Station Judge Advocate

Telephone number during working hours: 998-2561/3287

Telephone number during nonworking hours: See J00D, 998-3360

Duty NLSO attorney: See duty roster at J00D

COMMAND AUTHORIZED SEARCH GENERAL DISCUSSION

1. Basic Consideration. In order to ensure that any search authorization will be upheld as lawful, the Commanding Officer must carefully follow certain guidelines and policies that have been developed by the courts in relation to search. All the law concerning search and seizure is based on the Fourth Amendment of the United States Constitution, which states:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Almost 200 years of judicial interpretation have developed the Fourth Amendment into what is today a broad and multifaceted prohibition against unreasonable search. Several of the considerations might not be apparent upon a first reading of the Fourth Amendment, but are relevant in determining if a court will determine that a search was "reasonable" in a constitutional sense.

2. Impartiality. The Fourth Amendment has been interpreted as requiring that the person authorizing a search must be "impartial" or "neutral and detached." This means that the Commanding Officer must be detached from the police activities, i.e. the discovery and prosecution of crime. A problem arises when the Commanding Officer perhaps volunteers to be present at the time of the search. The court, in determining if the search authority was in fact impartial, looks suspiciously at any involvement by the Commanding Officer with the police and as a matter of course has generally held that involvement by the search authority in the actual search or in the investigation leading up to the granting of the search authorization results in loss of impartiality, resulting in an invalid search authorization. As a general rule, it is advisable for the Commanding Officer to remain detached from any police activities relating to the contemplated search.

3. Information Received. In determining if a search authorization should be issued, the Commanding Officer can use his own prior knowledge of facts relevant to the existence of probable cause. An example of this kind of information would be prior knowledge of the fact that an individual was a Security patrolman or narcotics investigator. As a practical matter (generally), the Commanding Officer will have little or no prior knowledge relating to a request for search authorization. The person requesting search authorization can approach the search authority and orally relate relevant information, in which case the search authority should first place the person under oath. A suggested format is as follows:

"Do you solemnly swear that the information you are about to provide is true to the best of your knowledge and belief, so help you God?"

9 Apr 90

After the oath is administered, the Commanding Officer should record the information using a "Record of Oral Request for Search Authorization." In lieu, or in addition to orally related information, the person requesting the search can present information in writing using the "Affidavit for Search Authorization" form. This is by far preferable to receiving the information orally, both in terms of maintaining a record of exactly what information contained was made under oath or affirmation. Like the oral information, the person making the writing should either make the writing under oath or later affirm the contents of the writing under oath. The Commanding Officer, or any person empowered to administer oaths, should place the maker of the record under oath. The key thing for the Commanding Officer to remember is that the information received by him on which he bases his determination that probable cause exists must be reliable. It should be obtained under oath or affirmation. The search authority may receive and consider a statement by an investigator or informant and the information submitted to the search authority may be based on hearsay. As an example, the investigator, in his sworn statement might say, "I was told by a reliable informant that there was about an ounce of high grade marijuana in Sailor Dealer's locker, Room 000, Barracks 6." The investigator making the sworn statement may rely on information which he received which was not sworn to when he received it. The Commanding Officer must consider the information and determine if it is credible or reliable.

4. Probable Cause. When evaluating the information properly before him the search authority must then determine if "probable cause" is present. Probable cause may be defined as follows:

Facts and circumstances sufficiently strong in themselves to lead a cautious and impartial official to believe that a person or persons have committed, are in the process of committing, or about to commit a crime, and that the specific person, item, or place to be searched contains evidence relating to the crime which is legally seizable.

This definition can be broken down as follows:

a. "Facts and circumstances." The search authority cannot base his determination of probable cause on opinions or conclusory statements. Often statements appear to be factual but are really opinion. Example: "I smelled marijuana" combines both the fact that the speaker smelled something and his opinion that what he smelled was marijuana. The search authority must know what facts the speaker relied upon in forming that opinion, i.e., his prior training and experience in drug investigations. Look carefully at each statement and ask if this is fact or opinion. Subject the statement to a logical analysis and assume nothing. If you need to assume something in order to reach a conclusion when reviewing information, define that assumption and determine if it can be verified from the information you have before you or if additional information is necessary.

b. "Cautious and impartial official." Impartiality has already been discussed. Cautious implies that the search authority will view the information

with a view that if a search authorization is granted, it will cause an invasion of some persons' reasonable expectation of security and privacy.

c. "To believe." The Commanding Officer must reach the logical conclusion that the requested search will result in the seizure of the property sought for. The Commanding Officer must also personally believe that the requested search will be successful in obtaining the property. Thus, the process of determining the existence of probable cause involves not only an objective determination, but also a subjective determination. As an example, a case involving a command authorized search was overturned even though the judge agreed that the information presented to the search authority was sufficient to find that probable cause existed because the search authority testified that he personally did not believe that the search would turn up the property being looked for.

d. "Have committed, are in the process of committing, or are about to commit a crime." The search must be related to a criminal offense. If you do not have a crime, you do not have a reason to search for incriminating evidence.

e. "Specific person, items, or place." Recall the language of the Fourth Amendment which requires that the place to be searched be "particularly described." This requirement has been interpreted very narrowly by the courts in order to avoid unnecessarily broad invasions of privacy. The search authority must look to the needs of the search and determine the minimum intrusion necessary to meet those needs. Intrusions or invasions of privacy which are overly broad will result in invalidating an otherwise legal search. The search authority should exercise great care in determining the proper limits of the search and must specifically define and identify the person, item, or place to be searched in his search authorization. Example: an authorization to search Barracks 6 when the purpose of the search is to see if the areas controlled by Sailor Dealer contain drugs is clearly overbroad, and will be held invalid. Likewise, a search of Sailor Dealer's barracks may be overbroad if there are areas of the room which he does not exercise control of dominion. Enclosure (7) provides greater details on this subject and should be consulted.

f. "Property . . . which is legally seizable." There are only four kinds of property which may be lawfully seized during a search. These are:

(1) Contraband: something which is illegal to possess. Commonly, certain drugs, weapons, etc.

(2) Fruits of a crime: commonly, stolen property.

(3) Tools or instrumentalities of a crime: stated in another way, this is property used to commit or facilitate crimes. Commonly, burglary tools, drug scales, false passes or decals, etc.

(4) Evidence: other property which may aid in the solution of a particular crime, i.e., helps identify and convict the criminal.

9 Apr 90

g. Property which is to be seized must also be specifically described. Enclosure (4) provides guidance in defining the subject of a search and should be consulted.

h. In summary, while the determination of probable cause may appear to be complex, the basic concept is simple. Exactly what are the authorities looking for, where are they going to look, and why? And in your analysis of what, where, and why, assume nothing and be specific when you consider what the search will be. Enclosure (5) provides a list of questions which you might ask in reviewing the information presented to you.

5. Informant Information. Information which comes from an informant must be tested for reliability. Since the informant usually is not before the search authority (if he were, he should be sworn and a statement taken) the information he provides must go through a two-prong test. First, just like any other information, it should be reviewed to determine if it states fact or opinion, and if opinion, then the underlying facts upon which the opinion is based must be present. Second, the believability of the informant must be proved by fact presented to the search authority. Enclosure (5) provides a list of questions and considerations which are relevant when handling informant information. Of course, if the information was made under oath, that is strong evidence that it is truthful.

SPECIAL PROBLEM AREAS

1. BARRACKS

a. Often a barracks room will be occupied by more than one person. Various areas of the room are community areas, that is, they are accessible to all the occupants of the room. Other areas, such as lockers, are assigned to specific individuals. Thus, the barracks is divided up into various areas of differing interests, some community, and others that are personal.

b. Recall that you must find probable cause before authorizing a search. Part of that probable cause is to determine from the facts presented to you that the item(s) sought will be found in a particular person or place to be searched. Because the barracks has various areas of interest, you should consider each area separately when determining the existence of probable cause. That is, do you have probable cause to search the community areas of the room? Do you also have probable cause to search the locker assigned to an individual in the room?

c. As to the areas of personal interests, several questions should come to mind. Is the individual to whom the locker is assigned present? If not, why do you suspect that the item(s) to be searched for will be in that locker? Do other persons have access to that locker? Special care should be taken before authorizing a search of a locker where the person to whom the locker is assigned is absent.

2. BLOOD AND URINE SAMPLES. Rule 312(d) of the Rules of Evidence discusses the use of search authorization in cases where a nonconsensual extraction of blood or other bodily fluids is desired. Commonly, this would be a blood or urine sample to be analyzed for intoxication due to alcohol or drugs. A blood specimen may be the proper subject of a search authorization as evidence of a crime. All the elements of probable cause must be present before the search authorization can be made.

3. TELEPHONE REQUESTS FOR SEARCH AUTHORIZATION. The Rules of Evidence do not forbid telephonic search authorizations. Whenever practicable a search authorization will be predicated upon a sworn affidavit.

QUESTIONS TO BE ASKED BEFORE GRANTING A SEARCH AUTHORIZATION

1. NAME, RATE or RANK, and CAPACITY of the person requesting the search authorization.
2. NAME(s) of the person(s) suspected of committing the offenses in questions.
3. What FACTS lead the requestor to suspect the above person(s)?
4. What OFFENSE(s) are suspected of having been committed?
5. What FACTS lead the requestor to suspect the above offense(s)?
6. What PERSON, OBJECT, or PLACE does the requestor wish to search? The person, place, or object must be described with particularity. See Part I of enclosure (7) for discussion.
7. What ITEMS does the requestor expect to find and seize during the requested search?

Ask yourself:

- a. Are the items legally subject to search and seizure?
- b. Are the items identified with sufficient specifically?

See Part 2 of enclosure (7) for discussion.

8. What FACTS lead the requestor to believe that the property which he wishes to seize is actually located on the person, object, or place he wishes to search?
9. Who is the SOURCE of the above INFORMATION?
 - a. If the information, or a part of it, is from a person other than the requestor, go to the informant addendum, enclosure (6). Complete that, then go to the next question.
 - b. If the SOURCE for the information is the person you are questioning (the requestor), proceed to the next question.
10. What training or experience has the requestor had in investigating offenses of this type/identifying this type of contraband?
11. Is the requestor aware of any further information which he feels will provide grounds for the search of the person, object, or place?
12. Is the requestor withholding any information from you which may affect your decision on his request?

9 Apr 90

THE SEARCH AUTHORIZATION

After receiving the above information, if you are satisfied as to the reliability of the information and the credibility of the person from whom you receive it, and . . .

that information leads you to believe that an offense has been committed and that identified items relating to that offense will be found in the place wished to be searched, then you may authorize the search and seizure.

When you authorize a search, tell the requestor EXACTLY the PERSON, OBJECT, or PLACE to be searched and EXACTLY WHAT ITEMS or KINDS OF PROPERTY are to be searched for.

SEARCH AUTHORIZATION: INFORMANT ADDENDUM

1. First Inquiry: What forms the basis of the informant's knowledge?

You must find what facts (not conclusions) were given by informant to indicate that the items sought will be in the place described. (Beware of second- and third-hand information. Information so considered must be credible and reliable.)

2. Then you must find that either:

a. The informant is a credible one:

(1) How long has the investigator known the informant?

(2) Has this person provided information in the past?

(3) Has the provided information always proven correct in the past?

Almost always? Never?

(4) Has the person ever provided any false or misleading information?

(5) (If a drug case) Has the person ever identified drugs in the presence of the investigator? What knowledge does the person have about drugs?

(6) Has any prior information given by the informant resulted in conviction? Acquittal? Are there any cases still awaiting trial?

(7) What other situational background information was provided by the informant which substantiates credibility (i.e., accurate description of interior of locker room, etc.)?

(8) Any other information which would lead you to believe that the informant is believable (service record, character references, supervisor, command).

OR b. The information which the informant has provided is reliable:

(1) Does the investigator possess other information from known reliable sources which corroborates the informant's story or otherwise indicates that the information is true?

SEARCHES: DESCRIPTION OF WHERE TO LOOK AND
DESCRIPTION OF ITEMS TO BE SEIZED

Requirement of Specificity: No valid search authorization will exist unless the place to be searched and the items sought are particularly described.

1. Description of the place to be searched (or the person):

a. Persons: Always include all known facts about the individual, such as the name, rate, SSN, and unit. If the name is unknown, include personal description, places frequented, known associates, make of auto driven, usual attire, etc.

b. Places: Be as specific as possible, with great effort to prevent the area which you are authorizing to be searched from being excessively broad, giving rise to the claim that the search was a "fishing expedition."

(1) In determining a request for authorization to search a barracks room, recall that you must find probable cause to believe that the items being searched for will be found in the particular place for which you have authorized the search. In certain cases there will be circumstances where you will have probable cause to authorize a search of the community areas of a room, but not have facts sufficient to find probable cause to authorize a search of the occupant's individual lockers. An example of such a case might be where one occupant of a barracks room is suspected of possessing marijuana, and his roommate is on leave. Can you search his roommate's locker? If no facts have been presented to you to the effect that the suspect had access to the locker, i.e., a key or combination, or some other substantial evidence that leads you to believe that marijuana will be found in that locker, you should not authorize a search of the absent member's locker. Remember, you must find probable cause for each specific area to be searched.

(2) If you are in doubt as to whether there is probable cause to authorize a search of the individual lockers in a room, but believe probable cause exists to search the community areas of the room, authorize a search for only the community areas of the room. Example: The community areas of Room 310, Barracks 3.

(3) In a case where you have probable cause to authorize a search of both the community areas and the lockers of the individuals in the room, you should identify the lockers by the name of the person each locker is assigned. Example: The community areas of Room 310, Barracks 3, and the locker, dresser, and other areas assigned to or used by AN Salty Sailor.

2. What can be Seized: Types of property and sample descriptions.

Basic Rule: Go from the general to the specific description. Example: Purpose of search to discover/seize a Thompson submachine gun.

9 Apr 90

Authorization should state words to this effect: "Automatic firearms, including, but not limited to, one Thompson submachine gun . . .".

a. Contraband: Something which is illegal to possess. Example: (Marijuana), (Narcotics), including, but not limited to (heroin), (PCP), (cocaine), (LSD), and (), paraphernalia for the use, packaging, transferring, and sale of said contraband, including, but not limited to (scales), (papers), (pipes), (holders), (bottles), (syringes), (needles), (rubber tubes), and ().

Remember, specificity is important (i.e., suspected marijuana use/sale does not give probable cause for searching for hard narcotics. Other narcotics found at the search scene may be seized, as they are contraband found in plain sight where a search for marijuana and accompanying paraphernalia is authorized).

b. Fruits of a crime: Usually the stolen property. Example: "Household property, including, but not limited to, one GE clock, light blue in color, and one Sony 15-inch, portable color TV, tan in color with black knobs."

c. Tools or instrumentalities of a crime: Property used to commit crimes. Example: "Items used in measuring and packing of marijuana for distribution, including, but not limited to, cigarette rolling machines, rolling machines, rolling papers, scales, and plastic baggies."

d. Evidence which may aid in a particular crime solution: Helps identify criminals. Example: "Papers, documents, and effects which show dominion and control of said area, including, but not limited to, cancelled mail, stenciled clothing, wallets, receipts."